No. 81946-7

SUPREME COURT
OF THE STATE OF WASHINGTON

JIM A. TOBIN,

Respondent,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

RESPONDENT TOBIN'S ANSWER TO AMICI BRIEFS

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A. INTRODUCTION

The respondent Jim A. Tobin has received the amici curiae briefs of the Washington State Labor Council, AFL-CIO ("WSLC"), the Washington State Association for Justice Foundation ("WSAJF"), and the combined amici briefs of the Association of Washington Business ("AWB")/Washington Self-Insurers Association ("WSIA") in this matter. Tobin believes that the WSLC and WSAJF briefs largely support the arguments he has advanced before this Court, while the AWB/WSIA brief largely asks this Court to rule against Tobin for fiscal reasons not supported by a proper reading of RCW 51.24.060(1)(c). Their argument is also based on fiscal assumptions about third party recoveries that are fundamentally wrong.

B. ARGUMENT

Tobin agrees with WSLC's argument that in its brief at 8-9 that the pain and suffering he experienced in connection with his industrial injury was personal to him. AWB/WSIA deride Tobin's argument about who actually experiences the pain and suffering of an injury on the job, asserting that the industrial insurance system is not a "tort system." AWB/WSIA Br. at 10.[1] While AWB/WSIA speak in terms of a rather

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[1] Of course, AWB/WSIA are wrong in making such an argument. Washington's industrial insurance, as they recognized earlier in their own brief, was

sterile "societal interest" in reimbursement, *id.*, the reality is that real people experience trauma and pain of on-the-job injuries for which the industrial insurance system does not compensate them.

Tobin agrees with the argument advanced in WSLC's brief at 10-11 that the decision of the United States Supreme Court in *Arkansas Dep't of Health & Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L.Ed.2d 459 (2006) should guide this Court's treatment of the public policy issues present in this case. Other courts have found *Ahlborn* to be controlling. *See, e.g., Lima v. Vouis,* 174 Cal.App.4th 242, 94 Cal.Rptr.3d 183 (Cal. App. 2009) (Medicaid lien could only apply to that portion of settlement pertaining to past medical damages); *Chambers ex rel. Reeves v. Jain,* 839 N.Y.S.2d 432 (N.Y. Sup. 2007) (noting that all pre-*Ahlborn* decisions in New York regarding state's ability to access settlement proceeds for reimbursement were reversed).

AWB/WSIA claim that *Ahlborn* is "not on point," AWB/WSIA Br. at 10-11, but they miss the reason for Tobin's citation to *Ahlborn*. *Ahlborn* articulates a wise public policy that matches the scope of a governmental lien for reimbursement (in *Ahlborn*, for Medicaid benefits) with the recovery secured by the injured person. Just as Medicaid does

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created as a substitute for lawsuits in tort by workers against employers for injuries on the job. AWB/WSIA Br. at 7.

not compensate a beneficiary for pain and suffering and only reimburses for medical benefits, Washington's industrial insurance system largely does not compensate an injured worker for noneconomic damages like pain and suffering. The public policy in *Ahlborn* similarly animates this Court's decision in *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994) and was recognized by the dissent in *Wilson v. State,* 142 Wn.2d 40, 10 P.3d 1061 (2000).

Moreover, AWB/WSIA's only legal basis to distinguish *Ahlborn* is their contention that the United States Supreme Court's rationale was based on an express anti-lien statute, 42 U.S.C. § 1396 p (a). AWB/WSIA Br. at 11. Apparently, AWB/WSIA are unaware that there is a directly analogous anti-lien statute in Title 51 RCW. *See* RCW 51.32.040(1); *In re Marriage of Dugan-Guant,* 82 Wn. App. 16, 19, 915 P.2d 541 (1996) (transfer or assignment of industrial insurance benefits void per statute).

Further, AWB/WSIA assert that Tobin's reference to "made whole" policies drawn from insurance law relating to subrogation is misplaced. AWB/WSIA br. at 4, 9-10. Apart from dismissing the argument, they have no answer to it, citing no authority whatsoever on point. Washington's industrial insurance system, however, has the earmarks of an *insurance* system and insurance principles are relevant to interpreting Title 51 RCW. In fact, in RCW 51.16.035(2), the Legislature

specifically directed the Department of Labor & Industries ("Department") to set premiums "in accordance with recognized insurance principles." *See WR Enterprises, Inc. v. Dep't Labor & Indus.*, 147 Wn.2d 213, 226, 53 P.3d 504 (2002); *DiPietro Trucking Co. v. Dep't of Labor & Indus.*, 135 Wn. App. 693, 711-19, 145 P.3d 419 (2006), *review denied*, 161 Wn.2d 1006 (2007).

For the reasons articulated in Tobin's supplemental brief at 14, the principles of subrogation cases are useful tools to guide this Court in its discussion here, as the statutory lien created in RCW 51.24.035 resembles an interest enforceable in subrogation. *See generally, Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 191 P.3d 866 (2008) (discussing equitable and conventional (or contractual) subrogation).

More critically, both WSLC and WSAJF amicus briefs perceptively note that the critical statutory provision before this Court is RCW 51.24.060(1)(c), not RCW 51.24.030. Regardless of how the Legislature amended RCW 51.24.030(5) in 1995,[2] it left RCW 51.24.060(1)(c), as interpreted by this Court in *Flanigan, entirely intact.* As the WSAJF brief notes at 7-8, the Departmental lien right in RCW

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[2] Tobin believes that the Legislature's amendment of RCW 51.24.030 did not require that the Departmental lien extended to all of an injured worker's recovery, save loss of consortium damages, from a third party tortfeasor. But that issue need not be reached here in light of RCW 51.24.060(1)(c).

51.24.060(1)(c) only extends to *reimbursement* of funds for which the Department is "out of pocket." As the benefits under the Industrial Insurance Act do not encompass non-economic damages, such as an injured worker's pain and suffering, the Department (or self-insurers) are not entitled to recover such funds. As RCW 51.24.060(1)(c) was not amended by the Legislature in 1995 after *Flanigan* was decided, non-economic damages such as pain and suffering remain excluded from reimbursement under RCW 51.24.060(1)(c). WSAJF Br. at 10.

By contrast, AWB/WSIA offer little in the way of statutory interpretation. They do not even address Tobin's constitutional argument. They do not offer any explanation whatsoever why the *Flanigan* decision does not continue to control the interpretation of RCW 51.24.060(1)(c).

Instead, they raise arguments regarding the fiscal health of Washington's industrial insurance system. AWB/WSIA Br. at 11-14. But their argument is ultimately misplaced. Regardless of the fiscal status of Washington's industrial insurance system (and Tobin does not concede AWB/WSIA's dire portrait of the system's fiscal health), AWB/WSIA offer very little information to this Court as to the significance of third party recoveries by the Department or self-insurers when compared to the overall fiscal health of the system. AWB/WSIA imply that if the Court rules in Tobin's favor, the system's overall fiscal viability will be

somehow jeopardized. That is entirely untrue. According to its website, the Department in 2007-09 took in more than $3.1 billion in premiums (and received more than $1.1 billion in investment income) and paid out $3.8 billion in benefits to injured workers and their families (with operating costs of $485 million). Third party recoveries, by contrast, represent at most only a few millions of dollars. The "dire consequences" of a ruling favorable to Tobin are plainly overstated by AWB/WSIA.

Moreover, the WSLC amicus brief does an excellent job of noting the historic disinterest (and actual hostility) on the part of the Department toward third party recoveries by injured workers. When the Legislature provided financial incentives to third party recoveries in 1983 and 1984, third party recoveries to the Department *increased.* A policy contrary to *Flanigan* would be a *severe disincentive* to injured workers pursuing third party recoveries. Were the Court to adopt the Department's argument on pain and suffering damages under RCW 51.24.060(1)(c), it is highly likely that fewer plaintiffs attorneys would have the financial incentive to pursue third party tortfeasors responsible for workers' injuries. Thus, not only are AWB/WSIA wrong about the fiscal impact of a ruling favorable to Tobin here, the *exact opposite* of their argument is more likely to be true: a ruling favorable to the Department will result in fewer third party claims

resulting in fewer recoveries, thus compelling the State system and self-insurers to bear *more* of the cost of on-the-job injuries in Washington.

C. CONCLUSION

The WSLC and WSAJF briefs further support Tobin's position in this case that because the Department does not pay pain and suffering damages under the Industrial Insurance Act to an injured worker, it cannot be "reimbursed" by taking an injured worker's pain and suffering recovery secured from a tortfeasor under RCW 51.24.060(1)(c). This Court's decision in *Flanigan* remains controlling law in Washington. It is consistent with United States Supreme Court's decision in *Ahlborn* and general public policy principles in Washington.

Were the Court to interpret RCW 51.24.060 to permit the Department to obtain "reimbursement" from Tobin's pain and suffering award, such an action would constitute a taking or a violation of Tobin's right to substantive due process.

The AWB/WSIA argument concerning the fiscal implications of the Court of Appeals decision bears little resemblance to the reality of third party cases under the Industrial Insurance Act. A more liberal policy regarding reimbursement to injured workers has proven in the past to *enhance,* not diminish, recoveries for the Department and self-insurers.

This Court should affirm the Court of Appeals decision, and costs on appeal, including reasonable attorney fees, should be awarded to Tobin.

DATED this 4th day of November, 2009.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Respondent Tobin's Answer to Amici Briefs in Supreme Court Appeals Cause No. 81946-7 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 4, 2009, at Tukwila, Washington.

Paula Chapler, Legal Assistant
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